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Supreme Court, U.S.
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No. 95-282

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

ROGER O. BROOKS, et al.,
Petitioners,

VS.

UNITED AIRLINES, INC.,
Respondent.

On Petition For Writ of Certiorari To The Colorado Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The only appellee before the Colorado Court of Appeals was Defendant-Respondent United Airlines, Inc. With respect to the three individuals identified as respondents in the Petition for Writ of Certiorari filed in this Court (i.e., Richard J. Ferris, James J. Hartigan and David L. Pringle), the Colorado Court of Appeals entered an Order on June 1, 1993 stating that those three individuals "are not parties to this appeal." The Petitioners did not seek review of that Order, which is reprinted in the Appendix hereto at page A-1.

The corporate parent of Defendant-Respondent United Airlines, Inc. is UAL Corporation. There are the following subsidiaries: Four Star Insurance Company, Ltd.; Mileage Plus, Inc.; UAL Leasing Corporation; Air Wis Services, Inc.; Air Wisconsin, Inc.; United Airlines Credit Corporation; United Aviation Fuels Corporation; Kion De Mexico, S.A. de C.V.; United Cogen. Inc.; United Vacations, Inc.; Covia Corporation; United Worldwide Corporation; and Cypher Corporation.

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No. 95-282

In The

Supreme Court Of The United States

October Term, 1995

Roger O. Brooks, et al.,
Petitioners,

v.

United Airlines, Inc.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Defendant-Respondent United Airlines, Inc. ("United") hereby submits the following brief in opposition to the Petition for Writ of Certiorari filed by Plaintiffs-Petitioners Roger O. Brooks et al. ("plaintiffs") in the above-captioned matter.

OPINIONS AND ORDERS IN THE COURTS BELOW

There are no reported opinions or orders in this case. The opinion of the Colorado Court of Appeals, not selected for publication, is reprinted in the Appendix hereto at pages A-2 through A-18. United has reprinted the lower court's opinion in an Appendix to this Brief in Opposition because the opinion as reprinted in the Appendix to the Petition for Writ of Certiorari contained numerous typographical mistakes and omissions of text.

JURISDICTION

The Colorado Court of Appeals entered its opinion on June 16, 1994. That court entered an Order denying the plaintiffs' Petition for Rehearing on July 14, 1994. The statutory basis for this Court's jurisdiction to review on a writ of certiorari the decision of the Colorado Court of Appeals is 28 U.S.C. § 1257(a). The suggestion in the Petition for Writ of Certiorari that this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) is incorrect.

SUMMARY OF ARGUMENT

It is a well-recognized principle that federal labor law preempts state-law claims which would require the interpretation of a collective bargaining agreement. See Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 413 (1988). This Court's decision in Hawaiian Airlines, Inc. v. Norris, 114 S. Ct. 2239 (1994), removed any doubt as to

the applicability of Lingle, decided under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, to cases involving preemption under the Railway Labor Act, 45 U.S.C. §§ 151 et seq. It is indisputable that the Colorado Court of Appeals applied the Lingle standard in this case. As a result, the Colorado court's decision poses no conflict with the decision in Hawaiian Airlines or with any other decision of this Court.

As required by Lingle, the Colorado Court of Appeals analyzed the elements of each of the plaintiffs' causes of action under Colorado law in light of the specific circumstances of this case. The court concluded that each of the plaintiffs' state-law claims was dependent on a disputed interpretation of the October 17, 1985 collective bargaining agreement, in particular, on the meaning of the agreement's restrictions on asset transactions and other job-security provisions. The plaintiffs do not challenge that determination in this Court. The Colorado Court of Appeals concluded that the plaintiffs' claims were preempted by the Railway Labor Act, and, in so ruling, correctly applied the Lingle standard to the plaintiffs' claims in this case.

The plaintiffs contend that an exception to the Lingle doctrine should be created in this case because United was not a signatory to the October 17, 1985 collective bargaining agreement on which all of the plaintiffs' state-law claims are based. The plaintiffs' position finds no support in this Court's precedents.

Moreover, there is a long line of federal circuit court decisions holding, on the authority of Lingle, that state-law claims against a non-signatory to a collective bargaining agreement are preempted if those claims would require an interpretation of the labor agreement. Because the Court in Hawaiian Airlines expressly approved the Lingle standard, nothing in the Court's decision in Hawaiian Airlines called into question those circuit court decisions on which the Colorado Court of Appeals relied in this case. Those decisions were correctly decided: the rationale for the preemption doctrine, i.e., to promote uniformity and predictability in the meaning of collective bargaining agreements, is equally applicable whether or not one of the litigants is a signatory to the labor agreement.

The plaintiffs' asserted lack of an alternative remedy does not change the analysis. The doctrine of preemption addresses whether state or federal law governs a particular subject, and it is well-established that federal law governs the enforcement of rights based on, or dependent on the interpretation of, a collective bargaining agreement. The question of what remedy is available under the controlling law, in this case federal law, is separate and distinct from the question of which law is applicable. It is also a question that is not before this Court because the plaintiffs never even attempted to invoke an alternative remedy under federal law.

In addition to the above reasons, this is an inappropriate case for the Court's review because the decision of the Colorado court was not selected for official publication, and therefore cannot possibly create any confusion among the lower courts, and because this case presents at most an alleged "misapplication of a properly stated rule of law" which "rarely" supports the grant of a petition. Sup. Ct. R. 10.

ARGUMENT

I. THE DECISION OF THE COLORADO COURT OF APPEALS IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN HAWAIIAN AIRLINES, INC. V. NORRIS AND WITH THIS COURT'S OTHER PREEMPTION DECISIONS.

One of the "compelling reasons" to grant a petition for writ of certiorari is when "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The plaintiffs attempt to invoke that principle in this case. See, e.g., Petition for Writ of Certiorari ("Petition") at 4 (asserting that the decision of the Colorado Court of Appeals is "in direct contravention of this Court's decisions spanning six decades and culminating in Hawaiian Airlines"). However, as will be demonstrated below, the plaintiffs' argument is based on an inaccurate and incomplete description of this Court's decision in Hawaiian

Airlines, Inc. v. Norris ("Hawaiian Airlines"), 114 S. Ct. 2239 (1994). Upon a thorough examination of the decision in Hawaiian Airlines, it is clear that the ruling of the Colorado Court of Appeals is entirely consistent with this Court's decision.

The issue in Hawaiian Airlines was what standard should be applied in deciding whether the Railway Labor Act, 45 U.S.C. §§ 151 et seq., preempts a state-law claim. At the time of its decision in Hawaiian Airlines, the Court had not decided a case involving preemption of state-law claims by the Railway Labor Act since its 1972 decision in Andrews v. Louisville & Nashville Railroad, 406 U.S. 320 (1972). However, the Court had issued a number of decisions involving preemption under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185.[1] See, e.g., Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988); International Bhd. of Elec. Workers v. Hechler, 481 U.S. 851 (1987); and Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). In Lingle, the Court held that Section 301 preempts the application of state law where the state-law claim would require the interpretation of a collective bargaining agreement. Lingle, 486 U.S. at 413.

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[1] The Labor-Management Relations Act does not apply to an employer subject to the Railway Labor Act or to an employee of any such employer. See 29 U.S.C. §§ 152(2), (3).

Prior to the Court's decision in Hawaiian Airlines, some federal circuit courts had ruled that Railway Labor Act preemption was governed by the Lingle standard and that the Railway Labor Act therefore preempted only those state-law claims which would require the interpretation of a collective bargaining agreement. See, e.g., Anderson v. American Airlines, Inc., 2 F.3d 590, 595-596 (5th Cir. 1993); Davies v. American Airlines, Inc., 971 F.2d 463, 466-467 (10th Cir. 1992), cert. denied, 113 S. Ct. 2439 (1993). However, other courts had ruled that Railway Labor Act preemption was not limited to cases covered by the Lingle standard but also was applicable to preempt state-law claims which were founded upon some incident of the employment relationship independent of the terms of a collective bargaining agreement. See, e.g., Lorenz v. CSX Transp., Inc., 980 F.2d 263, 268 (4th Cir. 1992); Hirras v. National R.R. Passenger Corp., 10 F.3d 1142, 1145 (5th Cir.), vacated, 114 S. Ct. 2732 (1994).

The Court in Hawaiian Airlines resolved this conflict among the lower courts, and held that the proper standard for Railway Labor Act preemption is the Lingle standard for cases involving preemption under Section 301. As the Court explained, "we conclude that Lingle provides an appropriate framework for addressing pre-emption under the RLA, and we adopt the Lingle standard to resolve claims of RLA pre-emption." Hawaiian Airlines, 114 S. Ct. at 2249.

Although the decision of the Colorado Court of Appeals was issued on June 16, 1994 (see infra at A-2), four days before this Court's decision in Hawaiian Airlines, the opinion of the Colorado court indisputably establishes that the mandate of Hawaiian Airlines--to apply the Lingle standard in cases involving preemption under the Railway Labor Act--was followed:

> "In determining whether federal preemption exists under the RLA, the federal circuits have turned to the test announced under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) (1988). [Citations omitted.]
>
> * * *
>
> "The pertinent question in regard to preemption is whether 'the state-law claim[s] can be resolved without interpreting the agreement itself.' Lingle v. Norge Division of Magic Chef, Inc., supra, 486 U.S. at 410, 108 S. Ct. at 1883, 100 L. Ed. 2d at 421." Infra at A-9.[2]

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[2] Because its opinion makes clear that the Colorado Court of Appeals applied the Lingle standard in this case, it would be inappropriate for this Court to remand for reconsideration in light of Hawaiian Airlines, and the plaintiffs have not requested such relief.

Despite the foregoing, the plaintiffs contend that the decision of the Colorado Court of Appeals is an example of the "pervasive preemption" that was rejected by this Court in Hawaiian Airlines. See Petition at 5-6. This contention is without merit. The Court's rejection of "pervasive preemption" was in reference to the broad view of Railway Labor Act preemption, previously adopted by some lower courts, under which state-law claims were preempted even if the claims did not require interpretation of a collective bargaining agreement. See Hawaiian Airlines, 114 S. Ct. at 2245 n.5. However, as demonstrated above, the Colorado Court of Appeals did not adopt this broad view of Railway Labor Act preemption; rather, the Colorado court expressly applied the Lingle standard.

The plaintiffs also repeatedly assert that this Court's decision in Hawaiian Airlines narrowed the scope of Railway Labor Act preemption. See Petition at 5, 12, 17, and 20. However, the plaintiffs' reliance on the clarification of the scope of Railway Labor Act preemption effectuated by Hawaiian Airlines is misplaced. The Court's decision in Hawaiian Airlines only signified a change in the law to the extent a particular state or circuit court had previously applied a more expansive standard of preemption in Railway Labor Act cases than the standard for Section 301 cases set forth in Lingle. In such jurisdictions, Hawaiian Airlines surely did result in a narrowing of the scope of Railway Labor Act preemption. See, e.g., Felt v. Atchison, T. & S.F. Ry., 60 F.3d 1416, 1420 (9th Cir. 1995); Westbrook v. Sky Chefs, Inc.,

35 F.3d 316, 317-318 (7th Cir. 1994); Harris v. Hirsh, 654 N.E.2d 975 (N.Y. Ct. App. 1995). However, the lower court's opinion makes clear that Colorado is not one of those jurisdictions.

The Colorado Court of Appeals applied the standard articulated by the Court in Lingle to the circumstances of this case, and Hawaiian Airlines clearly did not modify or narrow the Lingle standard. See Hawaiian Airlines, 114 S. Ct. at 2249. There is nothing in the Court's opinion in Hawaiian Airlines that calls into question any of the federal circuit court decisions applying the Lingle standard on which the Colorado Court of Appeals relied in this case, and the plaintiffs' assertions to the contrary are incorrect.[3] See Petition at 14, 16.

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[3] Indeed, the plaintiffs did not even cite Hawaiian Airlines in their Petition for Rehearing before the Colorado Court of Appeals or in their Petition for Certiorari before the Colorado Supreme Court. The plaintiffs mentioned Hawaiian Airlines for the first time in their Reply Brief filed with the Colorado Supreme Court after United cited this Court's decision in its Brief in Opposition to Petition for Certiorari.

II. NEITHER UNITED'S STATUS AS A NON-SIGNATORY TO THE COLLECTIVE BARGAINING AGREEMENT NOR THE PLAINTIFFS' ALLEGED LACK OF AN ALTERNATIVE REMEDY JUSTIFIES A DEPARTURE FROM THIS COURT'S PREEMPTION PRECEDENTS.

The Colorado Court of Appeals held that all of the plaintiffs' state-law claims were dependent on a disputed interpretation of the October 17, 1985 collective bargaining agreement. The plaintiffs do not challenge that determination, and, as previously noted, such a determination ordinarily would be dispositive of the preemption issue under the standard set forth in this Court's precedents.

The plaintiffs, however, insist that "[t]he facts and issues of this case are uniquely qualified for certiorari review because this is the first instance that preemption under the RLA has been radically expanded to preclude state-based claims in a case involving unrelated (non-RLA) parties who have no labor or employment relationship, in a fashion that leaves the injured parties wholly without remedy or recourse under law." Petition at 3. See also id. at 10-11. The plaintiffs' characterization of the decision of the Colorado Court of Appeals as a radical departure from existing preemption caselaw is, however, totally inaccurate. Rather, in light of the relevant caselaw and the rationale for the preemption doctrine, United's status as a non-

signatory to the labor agreement and the plaintiffs' alleged lack of an alternative remedy do not justify a departure from this Court's preemption precedents.

The plaintiffs have not cited a single decision in which this Court held that a state-law claim, which was dependent on an interpretation of a collective bargaining agreement, was not preempted because the defendant was a non-signatory to the collective bargaining agreement or because the plaintiff would allegedly have no alternative remedy in the event the state-law claim was barred. Such an argument should be foreclosed by this Court's decision in Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962). In that case, the employer asserted a state-law cause of action for tortious interference with contract against 24 individual employees who had induced their co-workers to engage in a strike in violation of a no-strike clause in a collective bargaining agreement. The Court first held that the employer's state-law tort claim against its employees was preempted by Section 301, and then held that, as a matter of federal law, there was no cause of action against the employees for tortiously inducing their co-workers to violate the contractual obligation not to strike. Atkinson, 370 U.S. at 246-249. The result of the Court's decision was that the defendants were immune from liability for acts tortious under state law. See Sinclair Ref. Co. v. Atkinson, 290 F.2d 312, 319 (7th Cir. 1961). However, such immunity did not render the preemption doctrine inapplicable in Atkinson, and United's alleged immunity

likewise does not render preemption inapplicable in this case. See Petition at 11-19.

The plaintiffs' argument is also foreclosed by a long line of federal circuit court decisions, under the Railway Labor Act and Section 301, holding--without regard to whether or not a plaintiff would have an alternative remedy--that state-law claims against a non-signatory to a collective bargaining agreement are preempted where those claims would require an interpretation of the labor agreement. See infra at A-10 through A-11 (citing Brotherhood Railway Carmen v. Missouri Pac. R.R., 944 F.2d 1422 (8th Cir. 1991) (Railway Labor Act); Baylis v. Marriott Corp., 906 F.2d 874 (2d Cir. 1990) (same); Milne Employees Ass'n v. Sun Carriers, Inc., 960 F.2d 1401 (9th Cir. 1992), cert. denied, 113 S. Ct. 2927 (1993) (Section 301); International Union, United Mine Workers v. Covenant Coal Corp., 977 F.2d 895 (4th Cir. 1992) (same)).[4] In fact, in two of those cases, the courts

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[4] The Section 301 decisions cited by the Colorado Court of Appeals expressly relied on the Lingle standard. See Milne Employees Ass'n, 960 F.2d at 1407-1408; Covenant Coal Corp., 977 F.2d at 899; and Dougherty v. Parsec, Inc., 872 F.2d 766, 767-770 (6th Cir. 1989). In the two Railway Labor Act decisions cited by the Colorado court, the courts ruled, consistent with Lingle, that the state-law claims were preempted because those claims would require an interpretation of the collective bargaining agreement. See Brotherhood Railway Carmen, 944 F.2d at 1430; Baylis, 906 F.2d at 877. The Second Circuit

(continued...)

held that the plaintiff's state-law claim was preempted while expressly acknowledging that the plaintiff did not have an alternative federal remedy against the non-signatory. See Baylis, 906 F.2d at 875, 877-878; Covenant Coal Corp., 977 F.2d at 899-900. The plaintiffs, on the other hand, have failed to cite a single decision in which a federal circuit court held that a state-law claim which would require the interpretation of a collective bargaining agreement was not preempted because the defendant was a non-signatory or because the plaintiff allegedly did not have an alternative remedy.[5]

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[4](...continued)
recently observed that, to the extent its prior decision in Baylis contained any statements suggesting that Railway Labor Act preemption was broader than preemption under Section 301, those statements were no longer correct in light of Hawaiian Airlines. See Gay v. Carlson, 60 F.3d 83, 87 (2d Cir. 1995).

[5] The plaintiffs rely heavily on statements from the decision in Dougherty v. Parsec, Inc., 872 F.2d 766, 770-771 (6th Cir. 1989), to the effect that the preemption doctrine should generally be inapplicable in lawsuits against a non-signatory. See Petition at 12-13, 15-16. However, the basis for the Sixth Circuit's no-preemption holding in Dougherty was that, under Ohio law, it was not necessary to interpret the collective bargaining agreement to adjudicate the plaintiff's claim for tortious interference with contract. Id. at 770. The court's statements about the defendant's status as a non-signatory were dictum. Indeed, in subsequent decisions the Sixth Circuit has held that state-law claims against non-signatories are preempted
(continued...)

The above-described decisions are analytically correct. The question of whether or not an employee covered by a Railway Labor Act collective bargaining agreement has a remedy against a third party for that person's alleged involvement in the violation of the employee's rights under the labor agreement is a question that must be answered as a matter of federal law. International Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682, 691-692 (1963). See also Andrews v. Louisville & N. R.R., 406 U.S. 320, 323 (1972); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-457

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[5](...continued)
where, under the applicable state tort law, it would be necessary to interpret the underlying labor agreement. See, e.g., DeCoe v. General Motors Corp., 32 F.3d 212, 217-218 (6th Cir. 1994) (distinguishing Dougherty on the ground that Ohio tort law did not require proof of breach of the underlying contract).

The plaintiffs also rely on the Fourth Circuit's discussion in Covenant Coal Corp. of the availability of alternative remedies. See Petition at 14. However, there is nothing in the court's opinion to indicate that its finding of preemption was based on the existence of an alternative remedy. In any event, the Fourth Circuit specifically noted that one alternative remedy was for the union to bring suit directly against the signatories for breach of the labor agreement. See Covenant Coal Corp., 977 F.2d at 899. The plaintiffs in this case had the right under the Railway Labor Act to pursue, directly against their employer, their claims for breach of the collective bargaining agreement's job-security provisions, and the record will show that many did so.

(1957); and Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 102-104 (1962). The plaintiffs' asserted lack of an alternative remedy under federal law for the alleged breach of their job-security rights is, even if true, irrelevant to the preemption inquiry. The doctrine of preemption determines whether state or federal law governs a particular subject. The question of what remedy is available under the controlling federal law is a separate and distinct question which has no bearing on the preemption inquiry. See, e.g., Atkinson v. Sinclair Refining Co., 370 U.S. 238, 247 n.6 (1962) ("Our holding, however, is that the suit is a § 301 suit; whether there is a claim upon which relief can be granted is a separate question.").[6]

The federal circuit court decisions discussed above, and the decision of the Colorado Court of Appeals in the present case, are also fully consistent with the policy behind federal preemption of state-law claims that are dependent on an interpretation of the labor agreement. That policy is to promote uniformity and predictability in the meaning of contract terms and to avoid the confusion of subjecting the same contract language to construction by courts in all 50 states. As this Court has observed:

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[6] The question of whether the plaintiffs have an alternative remedy under federal law is not before this Court because the plaintiffs have chosen not to attempt to invoke the Railway Labor Act or any other federal law as a basis for recovery.

> "More important, the subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. . . ." Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-104 (1962) (citations omitted), quoted with approval in Lingle, 486 U.S. at 404 n.3. See also Lingle, 486 U.S. at 405-406; Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985).

Given the rationale for preemption, the status of a defendant as a non-signatory to the collective bargaining

agreement or the absence of an alternative remedy is not controlling as to the applicability of the doctrine. The application of state law to the terms of a labor agreement frustrates uniformity of meaning whether or not a litigant has other avenues of relief or has signed the collective bargaining agreement.

In light of the foregoing, it is misleading for the plaintiffs to characterize the decision of the Colorado Court of Appeals as a radical departure from existing law. Rather, there is ample authority for the application of the preemption doctrine to claims against a non-signatory, including in situations where a plaintiff allegedly would have no alternative to the state-law remedy. Accordingly, there is no need for this Court to review the lower court's decision.

III. THERE ARE ADDITIONAL REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI.

In addition to the above reasons, this is an inappropriate case for the Court's review because the opinion of the Colorado Court of Appeals was not selected for official publication and therefore cannot be cited in the Colorado courts except in limited circumstances not relevant here. Thus, even if the Colorado court's opinion were incorrect--which it is not--the opinion still would not create any confusion among the lower courts as to the proper application of this Court's preemption precedents.

Moreover, because it is indisputable that the Colorado Court of Appeals applied the correct legal standard, i.e., the Lingle standard, to the plaintiffs' claims in this case, the Petition presents at most a "misapplication of a properly stated rule of law." A petition for writ of certiorari is "rarely granted" in such circumstances. Sup. Ct. R. 10.

The Colorado Supreme Court did not believe this case was worthy of certiorari review. See Petition at A-29. United respectfully submits that this Court should reach the same conclusion.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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COLORADO COURT OF APPEALS **ORDER**
No. 92CA1657 and 92CA1732

Roger O. Brooks, et al.,

Plaintiff-Appellants,

v.

United Airlines, Inc., et al.,

Defendant-Appellees.

The court, having considered the response to its order dated May 20, 1993,

ORDERS that Richard J. Ferris, James J. Hartigan and David L. Pringle are not parties to this appeal. The amended motion for extension of time to file answer brief is GRANTED to and including June 4, 1993.

BY THE COURT

Dated: June 1, 1993

Copies to: Counsel of Record ag/sa

COLORADO COURT OF APPEALS June 16, 1994
No. 92CA1657
No. 92CA1723 NOT SELECTED FOR PUBLICATION

[Caption Pages Intentionally Omitted]

Appeal from the District Court of the City and County of Denver

Honorable H. Jeffrey Bayless, Judge

No. 88CV13521
No. 88CV13524
No. 88CV16656
No. 88CV16658
No. 88CV21047

Division V JUDGMENT AFFIRMED
Opinion by JUDGE MARQUEZ
Davidson and Briggs, JJ., concur

Kenneth A. Roberts, P.C., Kenneth A.B. Roberts, Jr., Denver, Colorado; Retrum, Retrum & Donaldson, Craig W. Donaldson, Lakewood, Colorado; Richard A. Winkel, Denver, Colorado; Richard S. Shafer, Aurora, Colorado;

Waller & Mark P.C., William C. Waller, Denis H. Mark, Denver, Colorado, for Plaintiffs-Appellants

Davis, Graham & Stubbs, Dale R. Harris, M. James Grode, Denver, Colorado; O'Melveny & Myers, Chris Hollinger, Robert A. Siegel, Los Angeles, California, for Defendants-Appellees

In this consolidated action, plaintiffs, approximately 775 former employees of Frontier Airlines, Inc. (Frontier), appeal a summary judgment in favor of defendants, United Airlines, Inc. (United), a Delaware Corp., Richard J. Ferris, James J. Hartigan and David L. Pringle. We affirm.

This dispute centers around two contracts involving plaintiffs, Frontier, United, and People Express, Inc. (People). The first contract was entered into on October 17, 1985 (October 1985 agreement) between People, Frontier, and the Frontier unions, of which plaintiffs are members. A portion of this agreement addressed rates of pay, rules, or working conditions, which are generally considered collective bargaining terms. See 45 U.S.C. §151a (1988).

Other sections of this contract address subjects that, according to plaintiffs, are not collective bargaining terms. As stated by plaintiffs, this non-collective-bargaining portion was designed to "provide a security package with

specific contractual protections for plaintiffs against any restructuring of Frontier or the unapproved sale or disposal of Frontier's assets." Two such provisions provide:

> 9. No Merger. People and Frontier agree that Frontier will not be merged, consolidated or otherwise combined with any other airline, and that Frontier employees will not be merged with employees of any other airline, regardless of otherwise permitted corporate or airline relationship action, and that Frontier will be operated as a separate entity with its own name, colors, and uniforms until at least February 1, 1990.
>
> 12. Sale of Holdings/ Airlines/ Frontier. People agrees that it will not voluntarily sell or agree to sell all or part of the stock of Frontier, or grant any proxy with respect to the stock of Frontier, or voluntarily take any action or agree not to take any action with respect to the stock of Frontier, or voluntarily take any action to permit Frontier to issue a material amount of common stock of Frontier, or enter into any transaction for the sale, transfer or control of all or a material amount of the assets or business of Frontier, whether by merger, consolidation, or otherwise, directly

> or indirectly to any air carrier which at the date hereof is operating under the protection of the federal bankruptcy laws or any affiliate of such a carrier.

In addition, paragraph 11 of the October 1985 agreement restricts the ability of People to sell Frontier's assets. That paragraph provides in pertinent part:

> Based on the existing pool of assets, during the term of this Agreement, Frontier will not sell or otherwise dispose of assets, including sales or dispositions in the ordinary course of business, in excess of aggregate proceeds of $25 million . . . .
>
> . . . .
>
> In entering into this Agreement, People intends that Frontier shall be a viable entity, that Frontier be strengthened as an airline, and that Frontier experience profitable growth, and People and Frontier shall make every reasonable effort to accomplish the foregoing. In addition, given profitable growth at Frontier, People shall endeavor and make every reasonable effort to promote and expand both Frontier and People Express Airlines, Inc. at approximately proportional rates.

The second contract was entered into on July 10, 1986, between United and People, and it provided for the sale of Frontier by to United. Although plaintiffs were not a party to this agreement, the agreement provides that United's purchase of assets described in the agreement "shall be subject to (1) any approvals of Frontier unions required pursuant to paragraph 11 of the agreement dated October 17, 1985, between People, Frontier, and the Frontier unions. . . ."

In this action, plaintiffs assert claims for tortious interference with the October 1985 agreement, breach of contract/third party beneficiaries, outrageous conduct, and fraud and misrepresentation.

Previously, United filed motions to dismiss plaintiffs' complaints pursuant to C.R.C.P. 12(b)(1) and 12(b)(5). United argued that plaintiffs' state law claims were preempted by the Railway Labor Act, 45 U.S.C. §151, et seq. (1982) (RLA), and these motions were granted. On the prior appeal, a different division of this court held that "absent a determination pursuant to C.R.C.P. 56, we are unable to dispose of the contract issue as a matter of law under the doctrine of preemption," and reversed and remanded the consolidated actions for further proceedings. However, that division determined that the October 1985 agreement is "in part" a collective bargaining agreement. See, e.g., Brooks v. United Airlines, Inc., (Colo. App. No. 89CA1572, February 14, 1991) (not selected for official publication).

On remand, plaintiffs filed amended complaints and United filed a motion for summary judgment which the trial court granted. The trial court concluded that the October 1985 agreement was an un-severable collective bargaining agreement under the purview of the RLA, that United had standing to assert an RLA-based preemption defense, and that plaintiffs' claims were preempted as a matter of law. We address these issues in order.

I.

Plaintiffs contend that the trial court erred by treating the court of appeals' statement that the October 1985 agreement "is, in part, a collective bargaining agreement" as the law of the case. We disagree.

The pronouncement of an appellate court on an issue in a case presented to it becomes the law of the case. People v. Roybal, 672 P.2d 1003 (Colo. 1983). This rule, however, does not extend to matters other than those which in fact were decided upon issues presented and considered in the initial review. Dando Co. V. Mangini, 107 Colo. 170, 109 P.2d 1055 (1941).

Here, the determination was made as a matter of law and was designed to guide the trial court on remand. Moreover, we agree with the determination that the October 1985 agreement is, at least in part, a collective bargaining agreement because, as stated in 45 U.S.C.

§151a, 152 (1988), it is an agreement "concerning rates of pay, rules, and working conditions."

II.

We further conclude that the trial court properly determined that the contract is a whole and is not severable.

The primary objective in the severability inquiry is to ascertain the intent of the contracting parties. The relevant question is whether a number of promises constitute one contract or more than one, and such issue is to be determined by inquiring whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever if any promise or set of promises were struck out. John v. United Advertising, Inc., 165 Colo. 193, 439 P.2d 53 (1968).

Here, the trial court ruled that continued labor concessions were the consideration for the promise not to merge or sell off assets of the airline. It further noted that the written contract contained no indication of the intention of the parties for the contract to be severable.

We thus conclude that the trial court properly determined that the contract was not severable.

III.

The dispositive determination thus becomes whether plaintiffs' claims are preempted as a matter of law. We conclude, as did the trial court, that they are preempted.

In determining whether federal preemption exists under the RLA, the federal circuits have turned to the test announced under §301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a) (1988). See Baylis v. Marriott Corp., 906 F.2d 874 (2d Cir. 1990); Beard v. Carrollton R.R., 893 F.2d 117 (6th Cir. 1989).

Under §301, "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is preempted . . . ." Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 405-06, 108 S.Ct. 1877, 1881, 100 L.Ed.2d 410, 426 (1988) (citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985)).

The pertinent question in regard to preemption is whether "the state-law claim[s] can be resolved without interpreting the agreement itself." Lingle v. Norge Division of Magic Chef, Inc., supra, 486 U.S. at 410, 108 S.Ct. at 1883, 100 L.Ed.2d at 421.

A.

First, however, relying on 45 U.S.C. §152, which addresses "any dispute between the carrier and the employees thereof," plaintiffs contend that the Railway Labor Act, by its terms, applies only to collective bargaining issues between an employer and its employees, and not employees of a third party. Plaintiffs assert that the dispute in this action is between United Airlines and former employees of Frontier Airlines and that the RLA precludes preemption. We disagree.

The preemption analysis set forth in Lingle has been applied in cases involving claims against a nonsignatory to a collective bargaining agreement. See International Union, United Mine Workers of America v. Covenant Coal Corp., 977 F.2d 895, 899 (4th Cir. 1992) ("holding that section 301 of the LMRA bars a federal cause of action for tortious interference with contract, yet simultaneously preempts the identical state law cause of action"); Dougherty v. Parsec, Inc., 872 F.2d 766 (6th Cir. 1989) (holding that a state-law claim for tortious interference with a business relationship was not preempted under the Lingle test); see also Milne Employees Ass'n v. Sun Carriers, Inc., 960 F.2d 1401 (9th Cir. 1991) (holding that a nonsignatory to a CBA has standing to remove a case on the basis of section 301 preemption if resolution of the state law claim requires interpretation of the collective bargaining agreement and, then, applying the Lingle test to the state-law claims

raised); Baylis v. Marriott Corp., supra (holding that a state-law claim for tortious inducement or breach of contract was preempted); Brotherhood Railway Carmen v. Missouri Pacific R.R. Co., 944 F.2d 1422 (8th Cir. 1991) (holding that tortious interference claim was preempted).

Further, we conclude that United has standing to raise this defense.

Because of our resolution of this issue, we need not address plaintiffs' claim that the trial court erred by applying the law of the case doctrine to conclude that United had standing to raise a preemption defense.

B.

We now turn to plaintiffs' claims and apply the Lingle test. Here, plaintiffs' first claim for relief is for intentional interference with contractual relations.

This tort has been defined as follows:

> One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other

> from the failure of the third person to perform the contract.

Memorial Gardens, Inc. v. Olympian Sales & Management Consultants, Inc., 690 P.2d 207, 210 (Colo. 1984); see Dougherty v. Parsec, Inc., supra.

In their amended complaints, plaintiffs allege that United tortiously interfered with the October 1985 agreement by "wrongfully converting indispensable Frontier assets with the intended and foreseeable result that plaintiffs would be irreparably damaged." Plaintiffs further contend that "[b]y wrongfully obtaining Frontier's key assets, and then reneging on the Agreement [presumably the July 1986 Agreement] to purchase the stock and integrate the employees, United destroyed all Frontier operations and assured the non-existence of the jobs of the plaintiffs." In plaintiffs' response to United's motion for summary judgment on the issue of preemption, they contend that United tortiously interfered with the October 1985 agreement by inducing People to violate the agreement.

The underlying basis for the claim appears to be that People sold Frontier's assets to United either because 1) United tortiously induced People to enter into the July 1986 agreement and fraudulently induced plaintiffs to approve the agreement which resulted in a violation of plaintiffs' rights under the October 1985 agreement; or 2) United tortiously induced People to enter into the July

1986 agreement and without obtaining plaintiffs' approval, in violation of plaintiffs' rights under the October 1985 agreement.

In either case, plaintiffs' rights under this claim for relief stem from those terms of the October 1985 agreement which define or integrally involve plaintiffs' working conditions and consideration provided for plaintiffs' acceptance of those working conditions. In our view, the state-law claim could not be determined without deciding plaintiffs' continuing rights and obligations under the October 1985 agreement.

Moreover, plaintiffs' claim ultimately requires a determination of the continuing validity of the October 1985 agreement. We recognize that this presents a different question than that of interpreting the meaning of the term in an admittedly valid collective-bargaining agreement. However, the supreme court in Lingle v. Norge Division of Magic Chef, Inc., supra, again confirmed that the underlying rationale in preempting state-law claims is to avoid inconsistent results under collective-bargaining agreements.

In the usual case, the validity of the agreement is not in question and the issue is whether the state-law claim depends upon the meaning of terms contained in the admittedly valid agreement. However, when the state-law claim depends upon a determination of the very validity of

the collective-bargaining agreement, inconsistent results are no less a concern.

We therefore conclude that, in the unusual circumstances presented here, because the state-law claim would in effect depend on our determination of the validity of the July 1986 agreement, which in turn would, in effect, determine the continuing validity of the October 1985 agreement, pre-emption is equally appropriate.

C.

Plaintiffs' second claim for relief is for "Breach Of Contract/Third Party Beneficiaries."

The July 1986 agreement provides:

> 2. The foregoing transaction is subject to the conclusion by no later than July 31, 1986, subject to ratification by the unions if required, by August 31, 1986, of agreements satisfactory to United with labor unions representing its employees and the employees of Frontier, concerning the terms and conditions applicable to United's acquisition and operation of Frontier. United agrees to use its best efforts to obtain such agreements.

In addition, United's purchase of assets under the July 1986 agreement was "subject to (1) any approvals of Frontier unions required pursuant to paragraph 11 of the agreement dated October 17, 1985."

To determine whether United breached the July 10, 1986 agreement requires an interpretation of the October 17, 1985 agreement.

Thus, we conclude that this claim is also preempted.

D.

Plaintiffs' third claim for relief is for intentional infliction of emotional distress and extreme and outrageous conduct.

Outrageous conduct is committed if, by extreme and outrageous conduct, an individual intentionally or recklessly causes severe emotional distress to another. Rubenstein v. South Denver National Bank, 762 P.2d 755 (Colo. App. 1988); CJI Civ. 3d 23:1 (1989). To qualify as outrageous, the offending conduct must go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. Churchey v. Adolph Coors, 759 P.2d 1336 (Colo. 1988); CJI Civ. 3d 23:2 (1989).

In their amended complaints plaintiffs claim that United's "acts and/or omissions and other wrongful

conduct" amount to extreme and outrageous conduct. Plaintiffs do not specify particulars concerning the outrageous conduct, except by incorporating previous allegations under this claim.

However, as the trial court noted:

> Plaintiffs in this case are not able to state the elements of their claim for outrageous conduct without reference to the October 17, 1985 contract. What plaintiffs are alleging, in essence, is that the outrageous act was obtaining Frontier's corporate operational assets. Even if true such action standing alone is not outrageous. It may become outrageous only in relation to a contract which prohibits such action. Therefore, under the unique facts of this case the claim of outrageous conduct would of necessity call for an interpretation of the October 17, 1985 contract.

Because the conduct here involves interpretation of a collective bargaining term, we conclude that plaintiffs' claim is preempted.

E.

In their fourth claim for relief, plaintiffs contend that United induced plaintiffs to accept and agree to the

July 1986 agreement with fraudulent representations that United would not only purchase the assets of Frontier but also its stock, and would continue the business and thereby protect Frontier's employees.

The elements of fraud include: (1) a false representation of a material existing fact; (2) knowledge on the part of the one making the representation that it is false; (3) ignorance on the part of the one to whom the representation is made of the falsity; (4) intention by the one making the representation that it be acted upon; (5) and action on the representation resulting in damage. Kinsey v. Preeson, 746 P.2d 542 (Colo. 1987). Moreover, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." C.R.C.P. 9(b).

The crux of this claim for relief is that United used fraud or misrepresentations to induce plaintiffs' approval as required by the July 1986 agreement. Without plaintiffs' approval or waiver, the sale would violate both the October 1985 agreement and the July 1986 agreement.

Under the fifth requirement, plaintiffs must act on the representation. Here, plaintiffs must demonstrate that, through fraud, plaintiffs relinquished protections they had obtained in the October 1985 agreement.

Once again, plaintiffs' claim requires interpretation of the October 1985 agreement and, thus, is preempted.

The judgment is affirmed.

JUDGE DAVIDSON and JUDGE BRIGGS concur.